

4. In light of both of these decisions, Plaintiff respectfully requests that the Court deny Defendant's requested continued stay.

5. This matter has already been stayed for seven months pending the decisions in *Tims* and *Cothron*, and there is little support for continuing the stay and enabling this case to further stagnate on the Court's docket. Such a decision would be prejudicial to Plaintiff. Indeed, the requested stay of indefinite duration will cause actual prejudice to the Plaintiffs' case. Witness memories fade over time and data—particularly the type of electronic information at issue in this case—becomes more difficult to adequately preserve, produce, or replicate in full as time goes on. *See Pagtalunan v. Galaza*, 291 F.3d 639, 643 (9th Cir. 2002) (“Unnecessary delay inherently increases the risk that witnesses’ memories will fade and evidence will become stale.” (citing *Sibron v. New York*, 392 U.S. 40 (1968))). As the Ninth Circuit has aptly explained:

We agree with the majority position that lengthy and indefinite stays place a plaintiff effectively out of court. Such an indefinite delay amounts to a refusal to proceed to a disposition on the merits . . . Even if litigation may eventually resume, such stays create a danger of denying justice by delay.

Blue Cross & Blue Shield of Alabama v. Unity Outpatient Surgery Ctr., Inc., 490 F.3d 718, 724 (9th Cir. 2007).

6. Where an appeal was merely speculative or not yet fully briefed, courts denied requests to stay pending said appeals or petitions for leave to appeal as such a stay is less definite and more likely to prejudice the non-moving party. *See, e.g., Donets v. Vivid Seats LLC*, No. 20-CV-03551, 2020 WL 9812033, at *4 (N.D. Ill. Dec. 15, 2020) (“[T]he Illinois Supreme Court has not yet granted the petition for leave to appeal in *McDonald*, and thus, the stay would not be as limited in duration.”); *Sherman v. Brandt Indus. USA Ltd*, No. 120CV01185MMMJEH, 2020 WL 12833905, at *2 (C.D. Ill. Sept. 15, 2020) (“Faced with a lengthy delay of the case given the recency of the appeal in *McDonald*, the Court [in *Mintun*] soundly exercised its discretion to

deny the stay . . .”). “[A] stay would be limited and unlikely to prejudice a party where it would be in place pending an appellate decision on a fully briefed case.” *Donets*, 2020 WL 9812033, at *4 (citing *Vaughan v. Biomat USA, Inc.*, No. 1:20 CV 04241, 2020 WL 6262359, at *2 (N.D. Ill. Oct. 23, 2020)).

7. Here, Defendant is effectively asking to stay all proceedings and discovery not only until the Illinois Supreme Court decides whether or not to rehear the *Cothron* case, but in the event that it does rehear the case, for the duration of any such rehearing. For the reasons stated above, Plaintiff does not agree to such an indefinite stay.

8. To be clear, there is currently no pending rehearing of the *Cothron* decision—Defendant’s counsel has stated its intent to petition for rehearing, and thus Defendant asks the Court to further stay this matter to see whether the Illinois Supreme Court is inclined to reconsider its own decision. However, as it stands, the Illinois Supreme Court’s holding in *Cothron* is a controlling interpretation of BIPA. The Court should lift the stay and allow this case to get off the ground.

Respectfully submitted,

Dated: March 10, 2023

D’LISA WILLIAMS, individually and on behalf
of all others similarly situated,

By: /s/ Patrick H. Peluso
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the above titled document was served upon counsel of record by filing such papers via the Court's ECF system on March 10, 2023.

/s/ Patrick H. Peluso